Supreme Court, U. S.
FILED
OCT 20 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-831

NEIL A. RINGQUIST,

Petitioner,

vs.

ROBERT E. HAMPTON, Chairman
United States Civil Service Commission;
The United States Civil Service Commission,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

R. LaMAR BISHOP
62 Exchange Place
Salt Lake City, Utah 84111
Counsel for Petitioner

and

DAVID S. DOLOWITZ
79 South State Street
Salt Lake City, Utah 84147

TABLE OF CONTENTS

Page

Citation to Opinions Below 1

Jurisdiction 2

The Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 8

I In holding that the procedures followed by the administrative agency did not constitute a deprivation of due process the United States Court of Appeals for the Seventh Circuit rendered a decision in conflict with the decisions of the United States Supreme Court and other Courts of Appeal 8

II In holding that a Government employee who was entitled by law to a hearing after dismissal is not entitled to have the agency action set aside when it is unsupported by substantial evidence the United States Court of Appeals for the Seventh Circuit rendered a decision which is in conflict with other Court of Appeals and the provisions of 5 U.S.C. 706(2) 14

Conclusions 23

Page

Appendix

A. Opinion of the Court of Appeals 1a

B. Opinion of the District Court 1b

C. Opinion of the Civil Service Commission .. 1c

D. Pertinent Text of Statutes Involved 1d

E. Pertinent Text of Regulations Involved 1e

Cases Cited

Arnett vs. Kennedy,
416 U.S. 135 (S. Ct. 1973) 9

Board of Regents vs. Roth,
408 U.S. 564 (S. Ct. 1972) 9, 22

Charlton vs. United States,
412 F. 2d 390 (3rd Cir. 1969) 14, 17, 19

Consolidated Edison Co. vs. NLRB,
305 U.S. 197 (S. Ct. 1938) 21

Halsey vs. Nitze,
390 F. 2d 142 (4th Cir. 1968) 14, 19

Hanifan vs. The United States,
354 F. 2d. 358 (Ct. Cl. 1972) 11, 12

Henley vs. The United States,
379 F. Supp. 1044 (M.D. Pa. 1974) 11, 20

Kowal vs. United States,
412 F. 2d 867 (Ct. Cl. 1969) 19

Page

Laws vs. Celebrezze,
368 F. 2d 640 (4th Cir. 1966) 14, 19

McNeill vs. Butz,
480 F. 2d 314 (8th Cir. 1973) 10, 11

Meyers vs. Nebraska,
262 U.S. 390 (S. Ct. 1923) 9

Morrissey vs. Brewer,
480 U.S. 471 (S. Ct. 1972) 9

NLRB vs. Columbia Enameling & Stamping Co.,
306 U.S. 292 (S. Ct. 1939) 21

Pauley vs. United States,
419 F. 2d 1061 (75th Cir. 1969) 16

Taylor vs. United States Civil Service Commission,
374 F. 2d 466 (9th Cir. 1967) 14, 19

Williams vs. Zuchert,
371 U.S. 531 (S. Ct. 1963) 12

Willner vs. Committee on Character & Fitness,
83 S. Ct. 1175 (S. Ct. 1963) 9

Wood vs. United States Post Office Department,
472 F. 2d 96 (7th Cir. 1973) 16, 22, 23

Wroblaski vs. Hampton,
528 F. 2d 852 (7th Cir. 1976) 16

TABLE OF AUTHORITIES

Page

A. Constitutional

U.S.C. Const. Amend. 5 3

U.S.C. Const. Amend. 6 3

B. Statutory

5 U.S.C. 554 ..... 21, 22

5 U.S.C. 556 ..... 12, 21, 22

5 U.S.C. 557 22

5 U.S.C. 702 17

5 U.S.C. 704 ..... 14, 18

5 U.S.C. 706 ..... 2, 14, 15, 16, 17, 21

5 U.S.C. 3301 22

5 U.S.C. 7511 ..... 16, 21, 22

5 U.S.C. 7701 ..... 16, 21, 22

C. Other

5 C.F.R. 752.201 21

5 C.F.R. 772.305 ..... 12, 20

5 C.F.R. 772.307 12

In the Supreme Court of the United States

OCTOBER TERM 1978

No. .....

NEIL A. RINGQUIST,

Petitioner,

vs.

ROBERT E. HAMPTON, Chairman
United States Civil Service Commission;
The United States Civil Service Commission,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment herein of the United States Court of Appeal for the Seventh Circuit entered in the above-entitled case on August 24, 1978.

CITATION TO OPINIONS BELOW

The unreported decision of the Civil Service Commission upholding the Internal Revenue Service's re-

moval of Plaintiff Appellant is printed in Appendix C hereto. The unreported memo opinion of the United States District Court Northern District of Illinois Eastern Division is printed in Appendix B hereto. The opinion of the United States Court of Appeals for the Seventh Circuit, is printed in Appendix A hereto as it is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on August 24, 1978. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

THE QUESTIONS PRESENTED

1. Did the Court below err when it held that the Plaintiff, who was entitled by law to an administrative review of the decision to terminate his employment was granted procedural due process when the record shows that he was denied his right to counsel; his right to have access to the Governments witnesses; his right to confront and cross examine the Governments witness; and when the Government failed to offer into evidence the affidavits on which it was relying.

2. Did the Court below error when it held that an employee who is entitled to a hearing by statute is not entitled to have the Agency Action set aside if it finds the action is "unsupported by substantial evidence." 5 U.S.C. 706 (2) (E).

3. Did the Court below error when it held that "the requisite intent" to make false statements can be inferred even though there is no evidence relating to the petitioners intent or motive.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ,"

AMENDMENT VI

". . . the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Administrative Procedure Act as amended 1967, United State Code Title 5. Because these provisions are lengthy, their pertinent text is set forth as Appendix D, Page 1d. The regulations involved are Civil Service Regulations 5 C.F.R. 700. Because these provisions are lengthy, their pertinent text is set forth as Appendix E page 1e.

STATEMENT OF THE CASE

Neil R. Ringquist, the Plaintiff Appellant, was first employed by the Internal Revenue Service (hereinafter referred to as IRS) in June of 1969. (Administrative Record Part II Page 121) (hereinafter referred to as A. R. part ..... page .....) From June 1969

through July of 1971 the Plaintiff-Appellant was a Revenue officer in the collection department of the IRS. (A. R. Part II page 122.) In July of 1971 the Plaintiff-Appellant was transferred to the position of office auditor (A.R. Part II page 123). For the remaining portion of 1971 he was in a training status. (A. R. Part II p.p. 123-124). For the next ten months, Mr. Ringquist served as an office auditor auditing personal tax returns in the Glen Ellyn office of the IRS (A.R. Part II p.p. 123). In late September of 1972 the Plaintiff-Appellant was assigned the task of auditing returns prepared by a tax preparer. (A. R. Part II p.p. 134).

The Plaintiff did not get any special training in the auditing of returns prepared by a tax preparer. (A. R. Part II p.p. 135). In fact, the Plaintiff-Appellant was instructed to conduct these audits and not to "nit-pick" on the itemized deductions. (A. R. Part II, p.p. 128, 135, A. R. Part III p.p.p 660.)

The Plaintiff-Appellant was assigned approximately 275 returns to audit in a three-month period (A. R. Part II p.p. 137-138, 148). The Plaintiff-Appellant was auditing 25 to 30 returns per day. (A. R. Part II p.p. 152, 179). This is from 6 to 10 times more than the normal audit work load. (A. R. Part II p.p. 178-179.) The Plaintiff-Appellant was so overloaded with audits at this time that his group supervisor directed him to stop preparing work papers after each audit, a deviation from the normal procedure. The Plaintiff-Appellant was instructed to prepare his work

papers on off days. Under these instructions the Plaintiff-Appellant was writing his work papers from two to six days after the audits were completed. (A. R. Part II p.p. 199-200, 223.) In some cases, other auditors actually prepared the Plaintiff-Appellants work papers (A. R. Part II p.p 228-229; A. R. Part III p.p. 655).

In December of 1974 the Plaintiff-Appellant was told to report to the office of Inspector Anthony A. Liss. When the Plaintiff-Appellant appeared with legal counsel, the IRS inspection department insisted that legal counsel be excluded from the meeting as it would be a breach of taxpayer confidentiality to have legal counsel present when taxpayer names might be mentioned. (A. R. Part III p.p. 657.)

The Government further restricted the Plaintiff-Appellant in that they refused to provide him with any reports or documents relating to their investigation, (Complaint Exhibit "E"). The Government originally refused to disclose the names of the taxpayers involved. At a later date they disclosed the names of the taxpayer-affiants to the Plaintiff-Appellant with the specific instructions not to disclose the names of the taxpayers even to his attorney. (Complaint Para. 12(a) (2) p.p. 3; Memorandum in support of Defendants' motion for Summary Judgment p.p. 10 (hereinafter referred to as G.B.P. ....) A. R. Part I p.p. 77).

On June 30, 1975, Plaintiff-Appellant received a notice of proposed adverse action listing seventeen specific instances of alleged false statements recorded in his audit work papers (A. R. Part I p.p. 71-77). Plain-

tiff-Appellant submitted a written reply, supported by three affidavits, wherein he denied all seventeen of the charges. (A. R. Part III p.p. 657-680.)

On September 22, 1975, the agency issued a decision sustaining 14 of the 17 specifications. Plaintiff-Appellant was removed from his Government employment on October 10, 1975. (A. R. Part III p.p 653-654.)

By letter dated October 2, 1975, Plaintiff-Appellant appealed the agency's decision and requested a hearing. (A. R. Part I, p.p. 66-67.) A hearing was held before Mr. Steven Manrose, Appeal Examiner, on December 4, 1975. (A. R. Part I p.p. 49-56.)

At the hearing the IRS presented two witnesses who testified to the proper auditing standards. (A. R. Part II p.p. 9-120.) In addition, the IRS produced 17 copies of a taxpayer affidavits. The affiants name and signature had been blocked out and an alphabetical letter had been inserted in its stead. (A.R. Part III p.p. 467-599.) Neither the affiants nor the agent who obtained these affidavits appeared at the trial to testify as to the affidavits or how they were obtained.

The Plaintiff-Appellant produced two IRS auditors who testified to proper auditing procedures and IRS training. (A. R. Part II p.p. 254-286.) The Plaintiff-Appellant himself testified under oath and denied all allegations and acts of wrong doing. (A. R. Part II p.p. 241-253.)

The Appeal Examiner sustained the agency decision (Appendix C.)

By letter dated January 24, 1976 the Plaintiff-Appellant requested that the Civil Service Commission's Appeal Review Board (hereinafter referred to as A.P.B.) review his case. (A. R. Part I p.p. 19-22.) The request was supplemented by an undated letter. (A.R. Part I p.p. 23.) Among other things, these letters specifically stated that specifications 11 and 16 were based solely upon unsigned affidavits. (A .R. Part I p.p. 23.) The A.R.B. denied this request by letter dated August 2, 1976, on the basis that the Plaintiff-Appellant had not identified the unsigned affidavits. (A. R. Part I p.p. 7.)

On December 15, 1976, the Plaintiff-Appellant filed this action in the United States District Court for the Northern Dsirtict of Illinois, Eastern Division. Jurisdiction was based upon 28 U.S.C. Sec. 1331, 28 U.S.C. Sec. 1361, 5 U.S.C. 556-557 and 5 U.S.C. 701-706. The Plaintiff-Appellant sought reinstatement, back pay, counsel fees, and such other relief as may be just and proper.

On March 3, 1977 the Defendant-Appellees filed a motion for Summary Judgment. The Plaintiff-Appellant filed a cross motion for Summary Judgment on March 21, 1977.

On June 29, 1977, the Honorable Judge Thomas R. McMillen, presiding judge of the United States District Court for the Northern District of Illinois,

Eastern Division, issued a decision denying the Plaintiff-Appellant's motion for Summary Judgment.

The District Court held that the action of the Commission was both procedurally correct and taken on a rational basis.

On August 24, 1977, the Plaintiff-Appellant filed a Notice of Appeal and the case was heard by the United States Court of Appeals for the Seventh Circuit on February 21, 1978. On August 24, 1978, the Court of Appeals affirmed the District Court decision. (Appendix A.)

REASONS FOR GRANTING THE WRIT

I

In holding that the procedures followed by the Administrative Agency did not constitute a deprivation of due process the United States Court of Appeals for the Seventh Circuit rendered a decision in conflict with decisions of the United States Supreme Court and other Courts of Appeal.

The Plaintiff-Appellant has consistently maintained and pointed out to the court that this is not the ordinary case of a Government employee being terminated for inefficiency. Here we are dealing with a long-term Government employee, working in a professional capacity, who has been discharged for having made false statements on work papers. A charge which is the equivalent of Civil Fraud. If sustained, this

charge will impose a significant stigma which would cause the Plaintiff-Appellant to suffer a great and grievious loss. This is a charge which reflects upon the Plaintiff-Appellants moral character, good name, reputation, honor and integrity.

The United States Supreme Court has dealt with this issue on many different occassions. See ***Meyer vs. Nebraska***, 262 U.S. 390 (1923); ***Willner vs. Committee on Character and Fitness***, 83 5 C.T. 1175 (1963); ***Board of Regents vs. Roth***, 408 U.S. 564 (1972); ***Arnett vs. Kennedy***, 416 U.S. 134 (1973). The clear import of these cases is that whenever a Government employee is discharged based upon unsupported charges which could wrongfully injure the reputation of an employee he has been deprived of liberty without due process of law.

The minimum requirements of due process of law were clearly deliniated in the case of ***Morrissey vs. Brewer***, 480 U.S. 471, 488-489; 92 5 C.T. 2593, 2604 (Sp. Ct. 1972):

> "They (minimum requirements) include
>
> (a) written notice of the claimed violations. . .
>
> (b) disclosing . . . of evidence against him;
>
> (c) opportunity to be heard in person and to present witnesses and documentary evidence:
>
> (d) the right to confront and cross-examine adverse witness;
>
> (e) a "neutral and detached hearing body . . .;

(f) a written statement by the fact finders as to evidence relied on and reasons for revoking parole."

The Plaintiff-Appellant in this case was clearly denied his right to due process.

First he was denied his right to legal counsel, (A. R. Part III p.p. 659). He was then denied his right of access to the full investigative reports. (Complaint Exhibit "E".) He was denied the right to refute the charges against him when the IRS refused to name the taxpayers who supposedly signed affidavits against the Plaintiff-Appellant. When the IRS did finally disclose the alleged affiants names it was with a strong admonition not to disclose the taxpayers names to any one. Not even the Plaintiff-Appellant's attorney. (Complaint Para. 12 (a) (2) p.p. 3; G.B. p.p. 10; A. R. Part I p.p. 77.)

At the hearing the Government did not produce any witnesses to testify against the Plaintiff-Appellant. Instead they produced 17 "affidavits", all of which had the name and signature of the taxpayer removed. The Plaintiff-Appellant did not have the opportunity to either confront or cross-examine his accusers.

In cases similar to this case, other courts have held that the individuals right to due process have been violated. The Plaintiff-Appellant was in exactly the same position as the Plaintiff in the "nameless informants" case of *McNeil vs. Butz*, 480 F 2d 314 (8th Cir. 1973). In the *McNeil* case the court reinstated a discharged

employee where the Governments case was based upon investigative reports which related statements of nameless informants.

The *McNeil* case is completely analogous to the case presently before the court. Although the Government had provided the Plaintiff-Appellant with the names of the Accusers he was prevented from using them. The "evidence file" which was never offered into evidence in the hearing contained 17 affidavits. All of these affidavits had the taxpayers names and signatures removed. The taxpayers were identified by alphabetical symbols, i.e., taxpayer A, B, C, etc. These "affidavits were accompanied by an investigative report which stated whether or not the affidavits had been signed. (A. R. Part III p.p. 461-599.) Neither the affiant nor the investigator testified at the hearing.

In the case of *Hanifan vs. The United States*, 354 F 2d 358 (Ct. CLs 1972). A special agent of the IRS was removed for inefficiency. At the Civil Service Commission hearing the IRS presented its case by affidavit. The Court reversed this case on the basis that the IRS agent was denied his right to due process of law in that he was denied his right to cross-examine witnesses.

In the case of *Henley vs. The United States*, 179 F. Supp., 1044 (M.D. Pa. 1974). The Court noted that the Government was attempting to hide behind 5 C.F.R. 772.307 (c) (2) which prohibits the Civil Service Commission from issuing subpoenas. The Court

would not allow this and stated that affidavits could not be considered as direct testimony unless the person who obtained the statements appeared to testify as to how they were obtained.

Both the District Court and the Court of Appeals place great emphasis on the fact that "the appeals examiner does not have subpoena power over third persons." 5 C.F.R. 772-307 (c) (2) and (3); *William vs. Zuckert*, 371 U.S. 531 (1963), vacated 372 U.S. 765 (1063) (District Court Decision p.p. 304 Appendix B; Court of Appeals Decision page 5, Appendix A). In the case of *Hanifan vs. United States*, (Supra) the Court would not allow the Government to hide behind 5 C.F.R. 772 307 (c) (2) which prohibits the Civil Service Commission from issuing subpoenas. This principal was violated by both lower courts in their respective decisions.

In addition, the lower court and agency decisions are contrary to the statute and regulations governing this matter. 5 C.F.R. 772.305 (a) provides that "statements of witnesses shall be by affidavit, *when practical.* (Emphasis added) 5 C.F.R. 772 307 (c) (3) provided that "Authority shall conduct the hearings and shall afford the parties opportunity to introduce evidence . . . *and to cross examine witnesses.* 5 C.F.R. 772.307 (c) (2) states "Both parties are entitled to produce witnesses. The appeal authority is not authorized to subpoena witnesses." The controlling statute in this area is 5 U.S.C. 556 (d) which provides in part ". . . the proponent of a rule or order has the burden of proof

. . . a party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, *and to conduct such cross-examination as may be required for a full and true disclosure of the facts.*" (Emphasis added)

The intent and meaning of the statute and regulation are clear. The party having the burden of proof must obtain the voluntary attendance and testimony of the adverse witness. After this initial safeguard has been complied with, the parties can submit additional evidence by affidavit. Of course, the additional evidence cannot be irrelevant, immaterial, or unduly repetitious. 5 U.S.C. 556 (d). This was not done in the instant matter.

In this case the Government has the burden of proof 5 U.S.C. 556 (d), (A. R. Part II p.p. 3.)

And the Government failed to produce the required adverse witnesses to satisfy the due process of law requirements. Since Mr. Ringquist had no duty to produce these witnesses, his statutory and constitutional rights have been denied him. This court should grant Certiorari to resolve the conflict between the decision of the United States Court of Appeals for the Seventh Circuit in the case at bar and the decisions of this Court and other courts of appeal on the question of the full scope of the right of due process of law as it pertains to the term, motion and hearing rights of a Government employee who is entitled to a hearing by law.

II

In holding that a Government employee who was entitled by law to a hearing after dismissal is not entitled to have the agency action set aside when it is unsupported by substantial evidence the United States Court of Appeals for the Seventh Circuit rendered a decision which is in conflict with other courts of appeal and the provision of 5 U.S.C. 706 (2).

The Seventh Circuit Court of Appeals held that the agency action must be overturned only if the agency action is not supportable on any rational basis. This decision of the Seventh Circuit is in direct conflict with the Court of Appeals for the Third Circuit in *Charlton vs. United States*, 412 F 2d 390 (3rd Cir. 1969). The Court of Appeals for the Fourth Circuit, *Halsey vs. Nitze*, 390 F. 2d 142 (4th Cir. 1968); *Law vs. Celebrezze*, 368 F. 2d. 640 (4th Cir. 1966), and the Ninth Circuit Court of Appeals in *Taylor vs. United States Civil Service Commission*, 374 F. 2d 466 (9th Cir. 1967); All of which require that such action be based upon substantial evidence. In addition the holding of the agency and courts below effectuate the nullification of 5 U.S.C. 704 and 5 U.S.C. 706.

The scope of judicial review of administrative action is defined by law in the Administrative Procedures Act.

"5 U.S.C. 704 Actions Reviewable

> Agency action made reviewable by statute and final agency action for which there is no adequate

remedy in a court are subject to judicial review . . . except as otherwise expressly required by statute, agency action otherwise final is final for purposed of this section whether or not there has been presented or determined an application for a declaratory order, for any other form of reconsideration, or unless the agency otherwise required by Rule and provides that the action meanwhile is inoperative, for an appeal to a superior authority."

"5 U.S.C. 706 Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action. The reviewing court shall —

(2) hold unlawful and set aside agency action, findings and conclusions found to be —

> (a) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (b) Contrary to constitutional right, power, privilege, or immunity;
>
> . . .
>
> (d) Without observance of procedures required by law;
>
> (e) Unsupported by substantial evidence in a case subject to Section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (f) Unwarranted by the facts to be extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. 7701 clearly provides for an appeal by a "preference eligible employee". 5 U.S.C.A. 7511 defined a "preference eligible employee" as a permanent non-probationary employee.

The Plaintiff-Appellant was employed by the IRS from June 1969 thru October 10, 1975 (A.R. Part II p.p. 121, A.R. Part III p.p. 653). As a preference eligible employee he was entitled to all of the protection of the Administrative Procedures Act including 5 U.S.C. 706.

The District Court chose to ignor this clear statutory mandate and relied upon the case of *Wroblaski vs. Hampton*, 528 F. 2d 852 (7th Circ. 1976) and held that the court only needs to determine whether or not the Commission was procedurally correct and is supported by a rational basis.

The Wroblaski case is not applicable however. As the Court pointed out in footnote No. 1 no agency action was required by statute and the requirements of 5 U.S.C. 706 were not applicable (p. 853). The Wroblaski case was based upon two other cases. *Pauley vs. United States*, 419 F. 2d 1061 (7th Cir. 1969); *Wood vs. United States Post Office Department*, 472 F. 2d 96 (7th Cir. 1973). A review of these cases reveals that the Plaintiff was not entitled to protection of 5 U.S.C. 706.

Pauley vs. United States Supra involved a Government employee who was transferred from a staff position in one city to a line position in another city, without a reduction in his pay grade. The Court held that this was not a reduction in rank and therefore the mandatory hearing provisions of 5 C.F.R., Part 752, sub part B did not apply. Hence 5 U.S.C. 706 did not apply.

The case of *Charlton vs. United States*, 412 F. 2d 390 (3rd Cir. 1969) presents the correct position in connection with the dismissal of an IRS employee. The lower court held that:

> "There has been substantial compliance with all the procedures and statutory requirements . . . we cannot inquire further into this matter." (p.p. 391).

The Court of Appeals reversed this case and in discussing the standard of review declared:

> "We are of the opinion that the standard of the scope of judicial review of a federal agency's action stated and applied by the District Court is erroneous and that its failure to inquire further into the matter, after finding that procedural requirements had been satisfied in the administrative proceedings compels reversal of its dismissal of Plaintiff's Complaint."

> The instant action was pursuant to the provisions of the Administrative Procedure Act now 5 U.S.C.A. 702.

> Section 706 spells out the scope of judicial review of a federal agency's action in clear and precise terms and is controlling and dispositive. It supercedes and makes irrelevant judicially fashioned concepts of the scope of judicial review

of a federal agency's action, declared both prior and subsequent to its enactment.

> Section 706 is mandatory by its terms and not merely declarative of 'guidelines' with respect to the scope of judicial review of a federal agency's action. It imposes on a federal court, *inter alia*, the mandatory duty to 'review the whole record (of the administrative proceedings) or those parts of it cited by a party", and to determine therefrom whether the agency's action was in accordance with procedures required by law and supported by "substantial evidence", or alternatively, capricious, arbitrary, an abuse of discretion, or otherwise not in accordance with law. (p. 392.)
>
> It must immediately be noted that cases most recently decided hold that courts after determining whether procedural requirements have been met *must* further determine upon review of the administrative record, whether substantial evidence supports the agency's action in disciplining a federal employee (emphasis in the original). (p. 394).

The Civil Service Commission's decision dated January 26, 1976 states "this is a final decision of the Federal Employees Appeals Authority and there is no further right of administrative review" (A. R. Part I, p.p. 56). Under these circumstances a clear reading of 5 U.S.C. 704 leads to the proper conclusion that the Court's scope of review is not limited to a determination that the action of the Civil Service Commission was procedurally correct.

In the "agencies Brief in Lieu of Closing Arguments" the Government argues that the decision must

be based upon substantial evidence. The following is a direct quote from the Government's brief as it appears in the record (A.R. Part I, p. 84).

> If the decision of the Internal Revenue Service to remove Mr. Ringquist is to be sustained, it is incumbent upon it to prove the reason and specifications which served as a basis for this decision. F. P.M. Supp. 751-2, S7-2. In this regard, the Federal Courts have frequently held that an agency must prove the charges in an adverse action case by substantial evidence. For example, in *Kowal vs. United States*, 412 F. 2d 867 (Ct. Cl., 1969), the Court of Claims noted that: "Its (i.e., the agency's) determination must be tested by the substantial evidence standard." Likewise, in *Charlton vs. United States*, 412 F. 2d 390, 394 (3rd Cir. 1969), the Court of Appeals stated:
>
> > "It must immediately be noted that cases more recently decided hold that courts after determining whether procedural requirements have been met must further determine, upon review of the administrative record, whether substantial evidence supports the federal agency's action in disciplining a federal employee."
>
> For additional cases holding that agencies are required to prove their charges by substantial evidence see, *Halsey vs. Nitze*, 390 F. 2d 142 (4th Cir. 1968) and *Taylor vs. United States Civil Service Commission*, 374 F. 2d 466 (9th Cir., 1967).
>
> Furthermore, in applying the substantial evidence standard, the court in *Laws vs. Celebrezze*, 368 F. 2d 640 (4th Cir., 1966) explained:

> "Substantial evidence, it has been held, is evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance . If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is 'substantial evidence.'"

In a case which is in point, the Court held that a discharge sustained upon evidence presented by affidavit was not a decision based upon substantial evidence. ***Henley vs. United States***, 379 F. Supp. 1044 (M.D. Pa. 1974).

In the *Henley* case an IRS agent was dismissed to promote the efficiency of the service. The Government provided two live witnesses neither of whom had any personal knowledge of the charges against the Plaintiff. The remaining portion of the Government's case was presented by affidavit. In discussing this case, the Court noted that the Government was attempting to hide behind 5 C.F.R. 772.305 (c) (2) which prohibits the Civil Service Commission from issuing subpoenas. The court did not allow this to be done. It ruled that affidavits could not be considered as direct testimony unless the person who obtained the statements appeared to testify as to how they were obtained.

If an analysis is made of the statutes involved, the same conclusion will be reached. 5 U.S.C. 556 (d) provides . . . "A sanction may not be imposed or rule issued except on consideration of the whole record or those parts thereof cited by a party and supported by

and in accordance with the reliable, probative, and substantial evidence." Further, 5 U.S.C. 706 provides: ". . . the reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (e) unsupported by substantial evidence.

Any preference eligible employee who is serving in a competitive position is entitled to a hearing on the record. 5 U.S.C. 7511, 5 U.S.C. 7701 and 5 C.F.R. 752.201. The administrative procedures act applies to any employee in every case requiring an ajudication based on the record after an agency hearing. 5 U.S.C. 554. "A sanction may not be imposed or rule issued except on consideration of the whole record of those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. 556 (c). Further, the "reviewing court shall . . . (2) hold unlawful and set aside agency action findings, and conclusions found to be . . . (E) unsupported by substantial evidence."

On several occasions the court have defined substantial evidence. In 1938 the Supreme Court said "substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" ***Consolidated Edison Co. vs. NLRB***, 305 U.S. 197, 229, 59 S. Ct. 206, 207 (1938) and in 1939 it said that substantial evidence "means evidence which is substantial, that is, *affording a substantial basis of fact from which the fact in issue can be reasonably inferred* . . . (emphasis added). ***NLRB vs. Columbian***

Enameling & Stamping Co., 306 U.S. 292, 300, 59 S. Ct. 501, 515 (1939).

There can be no question but that the Plaintiff-Appellant is a preference eligible employee. He was employed by the IRS from 1969 through October 19, 1975 (Complaint Exh. B, page 1, A.R. Part I p.p. 50, A.R. Part II p.p. 50). Despite the clear statutory language and the holdings of other circuit courts of appeals, the Seventh Circuit held that the Plaintiff-Appellant's case could be reviewed by the courts only if it was not supported by a rational basis. In reaching this conclusion the Court relied upon its own decision in the case of *Wood vs. United States Post Office Department*, 472 F 2d 96 (7th Cir. 1973), Cert. denied, 412 U.S. 939 (1973). In reaching this conclusion the 7th Cir. Court of Appeals pointed out that foot note No. 3, in the *Wood* case (p. 99) states that 5 U.S.C. 554 (a) (2) exempts employee tenure decisions from the operation of 5 U.S.C. 556 and 557.

This would appear to be a complete misreading of 5 U.S.C. 554 (a) (2). The Seventh Circuit equates tenure as being the same as termination. In fact, the term tenure refers to an employee status. 5 U.S.C. 3301 (1.3) (e) defines tenure as "the period of time an employee may reasonably expect to serve under his current appointment. The tenure of the Plaintiff-Appellant at the time he was first employed was one year. After completing one year, the employee becomes a "tenured" employee or a preference eligible employee and has the right to a statutory hearing on the record. 5 U.S.C. 7511 and 5 U.S.C. 7701. See also *Board of Regents vs. Roth*, 408 U.S. 564, 566 (1972), wherein there Court discusses the "tenured teacher" under Wisconsin law.

Further, the case of *Wood vs. United States Post Office, Supra,* can be distinguished in that Wood was not entitled to a hearing by statute. The facts indicated that Wood went directly from an agency hearing to the District Court thereby skipping the appeal to the Civil Service Agency. Such an appeal is necessary to obtain jurisdiction in the District Court.

This court should grant Certiorari to resolve the conflict between the decision of the United States Court of Appeals for the Seventh Circuit in the case at bar and the decisions of the Third Circuit, Fourth Circuit and the Ninth Circuit Court of Appeals.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Attorney for Petitioner
Rodney LaMar Bishop
62 East Exchange Place
Salt Lake City, Utah 84111

Of Counsel
Davis S. Dolowitz
Parsons, Behle & Latimer
79 South State Street
P.O. Box 11898 Salt Lake City, Utah 84147

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77-2051

NEIL A. RINGQUIST,

Plaintiff-Appellant,

v.

ROBERT E. HAMPTON, Chairman, United States Civil Service Commission, and The United States Civil Service Commission,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois.
No. 76-C-4576—Thomas R. McMillen, *Judge*

Argued February 21, 1978—Decided August 24, 1978

Before FAIRCHILD, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and SWYGERT, *Circuit Judge*.

CASTLE, *Senior Circuit Judge*. The issue in this appeal is whether plaintiff was properly discharged from his position as an auditor for the Internal Revenue Service (IRS). The district court upheld the discharge. We affirm.

I.

On June 30, 1975, plaintiff Neil Ringquist received notice from the IRS of a proposed action to discharge him for making false statements in his audit reports. The notice listed seventeen specifications which detailed deductions on various tax returns which plaintiff had listed as verified or substantiated but for which inadequate or no documentation existed. All of the specifications concerned tax returns completed by a tax preparer who, as plaintiff was aware, was under investigation for possible tax fraud. Plaintiff responded to the notice by written answer and affidavits claiming his statements were true according to his view of the proper technical definitions and auditing techniques and that he relied upon representations made to him by the tax preparer. On September 22, 1975 the agency sustained fourteen of the seventeen specifications and Ringquist was removed from his position. On October 2, 1975, plaintiff appealed the IRS discharge to the United States Civil Service Commission which, after a hearing, upheld the agency action. Following the refusal of the Civil Service Commission Appeals Review Board to reopen the case, Ringquist brought suit in the federal district court seeking reinstatement and back pay. The district court granted defendants' motion for summary judgment. This appeal followed.

II.

We must first address the issue raised as to the appropriate standard of review. In government employee discharge cases, the scope of review usually is limited to insuring that the proper procedures were followed and

that the discharge was not arbitrary and capricious. *Pauley v. United States*, 419 F.2d 1061, 1065 (7th Cir. 1969). Normally, an agency discharge decision is not arbitrary or capricious where the record shows a "rational basis" for the action. *Young v. Hampton*, 568 F.2d 1253, 1257 (7th Cir. 1977); *Wroblaski v. Hampton*, 528 F.2d 852, 853 (7th Cir. 1976); *Wood v. United States Post Office Department*, 472 F.2d 96, 99 (7th Cir.), *cert. denied*, 412 U.S. 939 (1973). However, in this case, plaintiff argues that the more demanding "substantial evidence" standard is mandated. As a basis for the claim, plaintiff states that he is a "preference eligible employee" under 5 U.S.C. § 7511 and, consequently, is entitled to appeal any "adverse action"[1] by an agency to the United States Civil Service Commission. 5 U.S.C. § 7701. Accordingly, Ringquist contends that since a termination hearing is "required by statute," 5 U.S.C. § 554, a reviewing court should set aside the agency action if it finds that the action is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E).

At first glance, there is some attractiveness to plaintiff's theory. In *Wroblaski v. Hampton*, *supra* at 853 n.1, this court noted that one reason for applying the rational basis standard over the substantial evidence standard was the § 706(2)(E) did not apply where an agency hearing was not required by statute. However, as pointed out in *Wood v. United States Post Office Department*, *supra* at 99 n.3, § 554(a)(2) exempts em-

[1] An "adverse action" is defined by § 7511(2) as "a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay."

ployee tenure decisions from the operation of §§ 556 and 557 and, therefore, from the substantial evidence standard of § 706(2)(E). In this context, § 7701 apparently was designed merely to give nonprobationary employees the right to have adverse actions reviewed by the Civil Service Commission and was not intended to trigger, ultimately, the provisions of § 706(2)(E). We therefore adhere to the standard enunciated in our prior decisions: reinstatement of a government employee will be ordered only where the discharge is not supportable on any rational basis.[2] *Pauley v. United States, supra* at 1066. *See also Brown v. Zuckert*, 349 F.2d 461, 463 (7th Cir. 1965), *cert. denied*, 382 U.S. 998 (1966) (discharge of veterans' preference eligible).

III.

Following this standard of review, we must initially determine if the required procedures have been followed. Appellant does not appear to argue that he was denied the procedures required by the applicable statutes and regulations: notice of the reasons for the proposed adverse action by the agency; a reasonable opportunity to answer; notice of the actual adverse action; and an appeal to the Civil Service Commission. § 7512(b); § 7701; 5 C.F.R., Part 752B. Rather, his procedural arguments apparently are directed toward challenging the constitutional validity of using taxpayer affidavits in support of the charge and denying him

[2] It is doubtful that the more demanding standard would affect the decision here since the district court also found substantial evidence to support the discharge. (Mem. Op. at 7.) **See also Wood v. United States Post Office Department, supra** at 99 n.4.

access to the full investigative reports on the returns in question.

First, plaintiff argues that the government's use of seventeen taxpayer affidavits before the Commission to support the specifications against him violated his due process rights of confrontation and cross-examination. We note at the outset that the due process clause is flexible and requires only "such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972. As stated in *Arnett v. Kennedy*, 416 U.S. 134, 157, 163 (1974), the post-dismissal administrative procedures followed in government employee discharge cases are generally sufficient to protect the employee's interest in not having his reputation injured by a wrongful discharge and these do not require strictly applied rules of evidence.[3] While we agree with plaintiff that careful adherence to proper procedures is especially warranted where a government employee is charged with making false statements, *see Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), we find that goal was accomplished here. The Code of Federal Regulations provides for statements of witnesses to be by affidavit whenever practicable. 5 C.F.R. § 772.305(a). Reading that provision together with the right of cross-examination guaranteed in § 772.307(c)(3) shows that the regulations contemplate crossexam-

[3] We are aware that the Court in **Arnett** was dealing with a discharge under § 7501 while plaintiff in the present action was a preference eligible under § 7701. However, we do not find a constitutional difference between the employee's interest in that case and plaintiff's interest here. Both cases are concerned with the effects of wrongful discharge.

ination of those witnesses who are actually called, rather than forcing all affiants to appear for cross-examination.[4] Under the circumstances of this case, we do not feel this procedure constituted a deprivation of due process.

Affiants were taxpayers and the Commission is not authorized to subpoena nonemployee witnesses. 5 C.F.R. § 772.307(c)(2). Also, although the reliability of the taxpayer affidavits was questioned by plaintiff, the affidavits do not contradict Ringquist's explanation of the audit discrepancies.[5] Plaintiff's theory of defense is that although the taxpayers did not have the documents to support the deductions which plaintiff found to be technically "verified," he innocently received the necessary verification from the tax preparer. (Appellant's Brief at 22.) Thus, it was unnecessary for plaintiff, in this case, to test the reliability of the affiants by cross-examination.[6] In light of these facts, the cases

[4] Plaintiff's representative at the Commission proceedings fully cross-examined the three witnesses called by the IRS. (R. 7, Part II, pp. 45, 95, 117.)

[5] Plaintiff suggests that the affidavits were secured from the taxpayers improperly and in violation of the taxpayers' rights. In the context of this case, we need not comment on plaintiff's standing to assert the taxpayers' rights. **Cf. Alderman v. United States**, 394 U.S. 165, 174 (1969) (some constitutional rights may not be vicariously asserted). We also note that since the taxpayer affidavits were statements against their interest, admissions that proper documentation did not exist for claimed deductions, they bear some independent indicia of reliability.

[6] A controversy developed at oral argument which warrants some discussion at this point. There is a statement in plaintiff-appellant's brief that when giving the taxpayer affidavits to plaintiff the IRS admonished Ringquist not to disclose the names of the taxpayers to his attorney since they were "confidential." (Appellant's Brief at 16.) The only factual document cited by plaintiff to show he was so admonished is the agency notice of proposed action which states, in general terms, that plaintiff should refer to the taxpayers by their letter codes when discussing his case with persons outside the Treasury Department.

cited by plaintiff are distinguishable. *McNeill v. Butz*, 480 F.2d 314, 317 (4th Cir. 1973) (no affidavits from unknown government informers); *Hanifan v. United States*, 354 F.2d 358, 363-64 (Ct. Cl. 1965) (affiants were agency employees); *Henley v. United States*, 379 F.Supp. 1044, 1052 (M.D. Pa. 1974) (written statements permissible but lacking "rational probative force").

Plaintiff's second due process argument is that he was denied access to certain portions of relevant investigative reports. These reports apparently related to the tax returns in question and were part of the total investigation of the target tax preparer. 5 C.F.R.

[6] **Continued**

At Oral argument, neither counsel was able to elucidate the status of the record on this point. Therefore, we have independently reviewed the record and discovered only one other reference to plaintiff being forbidden to give the names of affiants to counsel. That reference is in Ringquist's reply letter to the agency where plaintiff relates how his counsel was forbidden to accompany him to a pre-notice investigatory interview. (R. 7, Part III, pp. 657-59.) However, that document also states that plaintiff's counsel was later present when the IRS inspector read the taxpayers' names. **Id.** at 659.

Thus, while it is unclear whether plaintiff's lawyer was actually given full access to the affiant taxpayers' names, it is clear that plaintiff cannot now claim procedural error on that basis. There is nothing to show that plaintiff objected to this restriction, if any, on his consel at the agency level or that the restriction was carried over to the Commission appeal. Moreover, as stated by his counsel at oral argument, it is plaintiff's main argument that it was error for the agency to fail to produce affiants for cross-examination. In any event, as pointed out above, since plaintiff's theories of defense are not in conflict with the affidavits, plaintiff would gain nothing by calling the taxpayers. Therefore, while we would hesitate to affirm an administrative procedure which prevents an employee from himself seeking further testimony of persons who have already given statements on the record, in this case there is no evidence that Ringquist or his attorney actively sought that testimony.

§ 752.202(a)(2) states that the employee should be provided documents and investigative reports relied on to support the reasons given for the adverse action. As noted by the district court, the government certified by letter that plaintiff had received all material upon which his discharge was based. (Mem. Op. at 3.) It is not a violation of due process to withhold those portions of investigative reports which were not used to support the discharge. *See Moore v. Administrator, Veterans Administration*, 475 F.2d 1283, 1285 (D.C. Cir. 1973).

IV.

Having found that the proper procedures were followed, we must determine whether the record contains a rational basis for the discharge. Plaintiff was discharged for making false statements in his audit reports. More specifically, plaintiff was found to have stated in fourteen separate instances that certain deductions were verified or substantiated when the actual documentation could support only a portion of the deduction or none at all. In support of that charge, the IRS elicited testimony from two agency officials as to proper auditing techniques and terminology. (R. 7, Part II.) Also, the record contains taxpayer affidavits which show that there was a lack of documentation with regard to the deductions which plaintiff stated were verified as substantiated. (R. 7, Part III, pp. 453-601.) Finally, the evidence shows that plaintiff was aware that the tax preparer involved in the fourteen specifications was under investigation for possible tax fraud. (R. 7, Part II, pp. 31, 84, 134-37.)

Plaintiff suggests that the evidence, or lack of it, could also be viewed as showing that he followed what he believed to be accepted auditing practices, that the tax preparer gave him fraudulent documents which he innocently relied upon in verifying or substantiating the deductions, and that the discrepancies in the audit reports were mistakes caused by overwork. To accept this possible interpretation of the record would be beyond the scope of our review. *See Pauley v. United States, supra* at 1066. The evidence of when an auditor should state that a deduction has been verified, together with the absence of required documentation and plaintiff's knowledge of the ongoing investigation is rational evidence to support the Commission's conclusion. The Commission could infer the requisite intent from this evidence. Therefore, we find that the record shows there was at least a rational basis for concluding that plaintiff knowingly made false statements on the audit reports and, consequently, the Commission's decision to uphold the discharge was not arbitrary or capricious.

For the reasons stated above, the judgment of the lower court is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NEIL A. RINGQUIST,

Plaintiff,

v.

ROBERT E. HAMPTON, et al.,

Defendants.

No. 76 C 4576

DECISION

Both sides have filed motions for summary judgment in this case based primarily upon the administrative record made before the United States Civil Service Commission. The issue is whether or not the action of the Commission was procedurally correct and is supported by a rational basis. *Wroblaski v. Hampton*, 528 F.2d 852 (7th Cir. 1976). We find that these requirements have been satisfied and that summary judgment should be entered in behalf of the defendants.

Plaintiff was discharged by the Internal Revenue Service on October 10, 1975 because of certain irregularities which he allegedly committed in reviewing seventeen income tax returns prepared for taxpayers by one Mildred Winkels. She and the returns signed by her were the subject of a special survey underway by

I.R.S. of which plaintiff was aware. After due notice and charge, the Acting District Director of I.R.S. found that plaintiff had made false statements in auditing fourteen of the seventeen returns and ordered him removed from government service. (R. 653-4). Plaintiff appealed to the Civil Service Commission whose Appeals Examiner sustained the discharge by a decision dated January 16, 1976. (R. 49-56). The Civil Service Commission Appeals Review Board declined review, as was its right, whereupon plaintiff filed this action pursuant to 28 U.S.C. §1331(a).

Plaintiff complains that he was denied access to certain I.R.S. investigative reports. However, he has not shown that any of these reports were the basis for his discharge or that they contain material favorable to his defense. Since the decision of the Appeals Examiner is reviewed only on the basis of the evidence shown in it, we cannot find that plaintiff has been prejudiced by a failure to open up the entire investigative report to him. Nor has he sought production of this file in this court as was attempted in *Smith v. Schlesinger*, 513 F.2d 462 (D.C. Cir. 1975). The government has certified by letter dated November 24, 1975 that plaintiff has received all the material upon which the discharge was based, and in the circumstances of this case, we see no basis to question this. Therefore the government has complied with 5 C.F.R. §752.202(a)-(2), and a failure to give him information on which the action was *not* based is not error. *Moore v. Administrator, Veterans Administration*, 475 F.2d 1283 (D.C. Cir. 1973).

Plaintiff also complains that he was not allowed to cross examine the fourteen, or seventeen, taxpayers for whom Mildred Winkels prepared the returns. Plaintiff had the right to submit counter-affidavits or make other representations on his own behalf before his discharge of October 10, 1975 but did not have either a statutory or constitutional right of cross-examination. 5 C.F.R. §752.202(b); *Arnett v. Kennedy*, 416 U.S. 134 (1974). Likewise, on appeal to the Appeals Examiner of the Civil Service Commission, plaintiff has no right of cross-examination, although he had the right to present witnesses and to require government employees to appear. The Appeals Examiner does not have subpoena power over third persons. 5 C.F.R. §772.307(c)(2) and (3); *William v. Zuckert*, 371 U.S. 531 (1963), vacated 372 U.S. 765 (1963).

Since the foregoing regulation was followed, the requirement of *Wroblaski v. Hampton*, supra p. 1) has been satisfied by the government. In our view, the qualified cross-examination available to plaintiff at his post-termination hearing also satisfied the Due Process Clause. See *Arnett v. Kennedy, supra* p. 3, at 163 and 171. The absence of the taxpayers did not impair the fairness of the hearing. Plaintiff never challenged the credibility of the taxpayers. The issue was whether or not he had made a proper audit of the returns prepared by Ms. Winkels or, instead, had made a false statement concerning his own activities in the audit. Moreover, to expose the taxpayers to cross-examination would amount to a breach of the agency's duty to protect the confidentiality of their returns and would subject them to possible criminal charges.

Plaintiff also maintains that the affidavits of the seventeen taxpayers were obtained through duress, without giving them *Miranda* warnings and in other ways were in violation of 26 U.S.C. §7605(b). We doubt that plaintiff has standing to raise this particular objection, particularly since it was not raised before the Civil Service Commission. He still could bring this point before the Appeals Review Board of that Commission pursuant to 5 C.F.R. §772.310(a)(1), but unless it is part of the administrative record, it is not a matter which we have jurisdiction to review. *Polcover v. Secretary of Treasury*, 477 F.2d 1223 (D.C. Cir. 1973).

Plaintiff further complains that three of the affidavits were not signed by the taxpayers, although only two of them were found to constitute a basis for discharge. The affidavits were taken by I.R.S. agents, which constitutes a statement given under penalty of perjury . Furthermore, since only two of the fourteen specifications have this alleged deficiency, we find and conclude that this does not constitute an arbitrary or capricious actio nby I.R.S. under *Wroblaski v. Hampton*, supra p. 1.

The record shows that the decision by the Acting District Director of the I.R.S. and the Appeals Examiner for the Civil Service Commission is supported by the evidence and therefore has a rational basis in fact. Specifications 1, 7, 10, 11, 12, 15, 16 and 17 involve

false statements by the taxpayer. They had been approved by plaintiff apparently on the basis of oral statements of Mildred Winkels who was known by plaintiff to be the object of special scrutiny by the I.R.S. The taxpayers submitted affidavits in these proceedings that they had *no* documents to prove their deductible expenses, whereas plaintiff's worksheets indicated that some or all of the deductions were "verified as filed by complete records", "verified as filed by required records", "verified by store receipt", or in other ways "verified". Specifications 2, 3, 6, 8, 9 and 14 involved deductions approved as "verified" by plaintiff whereas the taxpayers failed to substantiate their deductions. Some of the deductions in Specifications 1 and 16 fall into this second category as well as in the previous category.

Finally, plaintiff alleges that removal from Federal employment was excessive punishment. We do not believe that it was, but this is not a matter with which this court can be concerned, in the absence of bad faith or malice. *Harvey v. Nunlist*, 499 F.2 335 (5th Cir. 1974).

Considering the narrow jurisdiction which we have in this case under §1331(a) as amended, and in view of our finding that the administrative officers followed the required procedures to the extent that plaintiff has invoked them, and that the decision is supported by a rational basis, we find and conclude that the tests set out in *Wroblaski v. Hampton*, supra p. 1, have been satisfied in the case at bar. Even if, as plaintiff con-

tends, the decision must be supported by substantial evidence, we find that it was and that his contentions do not affect the merits of the Appeals Officer's findings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted, and judgment is entered on the complaint in favor of defendants.

ENTER:

THOMAS R. McMILLEN,
Judge, U.S. District Court

DATED: June 29, 1977

APPENDIX C

UNITED STATES
CIVIL SERVICE COMMISSION

January 22, 1976

FEDERAL EMPLOYEE
APPEALS AUTHORITY

Chicago Field Office

DECISION

In The Matter Of

Appeal Of: NEIL A. RINGQUIST
Action Appealed: Removal
Employing Agency: Internal Revenue Service
Decision: Sustained

---

cc: Agency (Washington) 20220
Agency (Washington) 20224
Agency (Chicago, Il.)
Mr. David Wiener

(S E A L)

LELAND L. WALTON,
Chief Appeals Officer

UNITED STATES CIVIL SERVICE
COMMISSION
FEDERAL EMPLOYEE
APPEALS AUTHORITY
CHICAGO FIELD OFFICE
Chicago, Illinois 60604

APPEAL OF MR. NEIL A. RINGQUIST
UNDER SUBPART B OF PART 752 OF THE
CIVIL SERVICE REGULATIONS
DECIDED ON: JANUARY 16, 1976

INTRODUCTION

By a letter dated October 2, 1975, Mr. David Wiener appealed on behalf of Mr. Neil A. Ringquist, hereinafter referred to as appellant, who was removed from his position as Internal Revenue Agent, GS-512-11, $16,513, with the Internal Revenue Service in Chicago, Illinois. Appellant, not a veteran, was removed on October 10, 1975.

It has been determined that appellant's removal was an adverse action as defined in the Civil Service Regulations, and that appellant is entitled to appeal thereunder. The appeal was filed in a timely manner and it has been accepted for adjudication.

On December 4, 1975, a hearing was held in Chicago, Illinois, at which time both appellant and his representative, Mr. Wiener, were present. Management was represented by Mr. Thomas J. O'Rourke. A total

of six hearing exhibits were entered into the record, and subsequent to the hearing management submitted a written closing statement. With this decision, verbatim copies of the transcript of the hearing are being distributed.

BACKGROUND

Appellant worked for the Internal Revenue Service as a collection officer from 1969 through 1971. Beginning in July of 1971, he began training for the position of office auditor. When the training ended in December, he was assigned to an office audit group as an auditor. (TR: 122-124)

At approximately late September and early October 1972, appellant was assigned to audit numerous tax returns prepared by one Mildred Winkels, who was involved in the "Tax Preparers Program," a program designed to identify and investigate tax preparers who claimed exaggerated deductions and made fraudulent returns. (TR: 29, 82, 134-37)

With a deadline of the end of December 1972 to complete the audits, (TR: 137), appellant finished auditing approximately 278 returns by the end of November. (Evidence File: Tab 1; TR: 138, 143) (Note: Appellant indicated that the number of audits he did was somewhat less than 278, see Written Reply to Proposal Letter, page 6) Almost two years later, appellant became aware that he was under investigation with regard to his audit of those returns. (TR: 144) As a

result of that investigation, action was taken to remove appellant from his position due to allegedly making false statements in those reports.

ANALYSIS AND FINDINGS

Procedures

By letter dated June 30, 1975, appellant was notified by Mr. David G. Blattner, Chief of the Audit Division, of a proposal to remove him from the service. The letter cited seventeen specifications, wherein it was alleged that appellant had made false statements in his audit reports. Appellant was also notified that, in view of the confidentiality of the information, the tax cases cited in the various specifications were identified in an attachment to the proposal letter.

Without specifically quoting the specifications of the charge, it is found that they were set forth with sufficient specificity and detail to provide appellant a reasonable opportunity for refutation.

Appellant was allowed fifteen days from his receipt of the letter to reply personally and in writing and to submit affidavits in support thereof. He was also notified that he would be allowed official time to review the material relied upon to support the charges, to secure affidavits, and to prepare an answer.

Appellant requested an extension, and he was given until September 2, 1975, to reply. Appellant subsequently submitted an undated written reply, along with three affidavits.

In the letter, appellant denied that the statements he used in his audit reports were false and said that he had performed the audits in accordance with his prior training. In particular, he called attention to the difference in meaning between the words "verification" and "substantiation" as defined in the Internal Revenue Service Manual and noted that those words as used in his audit reports were in accordance with their accepted definition.

On September 22, 1975, Mr. John T. Ader, Acting District Director, made the agency's final decision. He stated that after consideration of the material in appellant's written reply, he found the charge of false statements and specifications 1-3, 6-12, and 14-17 to be sustained. He found that the sustained charge and these specifications warranted appellant's removal from the service and set its date as October 10, 1975. Specifications 4, 5 and 13 are considered to have been dismissed. Appellant was notified properly of his appeal rights.

It is found that all of the mandatory procedural requirements of Part 752B of the Regulations were observed by the agency in effecting the removal action.

Sufficiency of the Merits

The terms "verify" and "substantiate" are referred to on numerous occasions in the record. The term substantiate, as defined by the Internal Revenue Service, is "to establish by proof or true or competent evidence." Verify is defined "to establish the truth, accuracy or reality of an item." (Management and Petitioner's Hearing Exhibit No. 1)

Appellant testified that an item in a return had to be supported by documentary, primary evidence in order to be "substantiated;" however, an item could be "verified" by "objective and subjective" factors including primary, secondary, and collateral evidence. (TR: 130, 131) He stated that this difference was impressed upon him during his training, as he was told that substantiation would be available only in "10 to 15 percent" of the cases he would handle. (TR: 131, 132)

Ms. Patricia Altschul, Tax Auditor and appellant's training instructor, stated that substantiation meant obtaining supporting documentation, whereas verification could include other evidence, including the oral testimony of the person being audited. (TR: 272) Ms. Debora E. Sheridan, Revenue Agent who attended some of the training classes that appellant attended, testified that the two terms were "difficult to differentiate." She noted that she had to "see something" in order to substantiate it, but said that verification could be made in different ways. (TR: 278, 281) Ms. Consuelo Kertz, another of appellant's instructors during training, stated in an affidavit (attached to appellant's reply) that verification could be accomplished in a number of ways, including the oral testimony of the person being audited.

Management witnesses Robert Brock, Chief of the Conference Staff in Chicago, and Imelda Reid, Examination Branch Chief, testified that the terms "substantiation" and "verification" were used interchangeaby by auditors. (Tr: 14, 76, 97) Mr. Brock noted that an item not readily subject to verification by documentary

evidence could be allowed on other bases, such as an oral statement. He stated, however, that he would require documentary verification when that was available, (TR: 19) While Ms. Reid stated that an item usually would be verified by documentary evidence, she noted that other evidence could be used if primary sources were not available. (TR: 76-78)

An examination of the fourteen specifications wherein it is alleged that appellant made false statements reveals that the disputed deductions occurred on the Schedule A, Itemized Deductions, section of the returns. Appellant, in his reply to the proposed removal notice, denied that false statements were made and stated that he had used the accepted terminology and procedures as prescribed by the Internal Revenue Service. It is noted, however, that he did not deny the accuracy of the specifications themselves; he merely questioned the ultimate manner in which his wording was interpreted. It is found that each of the fourteen specifications was an accurate presentation of each particular fact situation.

Specification 1 states that appellant cited in his workpapers on taxpayer "A" that $629 deducted for medical and dental expenses was "verified in full as filed by required records." An affidavit by taxpayer "A," however, revealed that he did not have substantiating evidence to establish payment of over $50 for medical expenses. (Evidence File: Tab 3) Appellant did not identify what records he reviewed to verify the statement; he merely stated that he addressed himself to the

total return, not each component part, and when substantiation was not available, he would rely on the word of Ms. Winkels, who had a "very good knowledge of her clients." (TR: 148-150)

There were no records available to verify the claimed deduction of $629, and appellant's statement in his workpapers is, therefore, found to be false. (Note: Auditing procedures required an auditor to specifically state in his workpapers what he examined that supported the deduction. If oral testimony was relied upon, it should have been noted in the papers. (TR: 78)

Specification 1 also noted that appellant claimed to have "verified" $480 for a contributions deduction. The taxpayer, however, could substantiate only $20 of the total. Appellant was able to explain this discrepancy only by saying he "verified" returns; i.e. he relied on the available evidence to determine the validity of the deduction. (Evidence File: Tab 47, page 10)

Similarly, in specifications 2, 3, 6, 8, 9, and 14 appellant approved certain deductions using such terms as "verified," "verified in full," "verified as filed," "okay as filed," and "all verified." Subsequent affidavits filed by each of the taxpayers, however, failed to substantiate any of the amounts "verified" by appellant. Appellant again testified that he satisfied himself as to the accuracy of each return by whatever evidence that was available. (TR: 154, 158, 170, 176, 177, 179, 193)

In specification 7 appellant "verified as filed by complete records" a $624.60 contribution. Substanti-

ation supplied by the taxpayer was only $150.00. (File: Tab 14) Appellant could not identify what were the "complete records" he referred to in his workpapers. He stated that he had probably seen records "complete enough . . . . that I was satisfied as to the total deduction . . ." (TR: 172) Appellant's statement that "complete records" verified the deduction is, therefore, found to be false.

In specification 10 appellant "verified as filed by required records" an interest expense of $399; however, taxpayer "J" stated that he did not incur any interest expense that year. (File: Tab 19) Appellant noted that taxpayer "J" had previously claimed interest expense on his 1970 return (identified as that of taxpayer "I" in specification 9) and said that he "might" have seen documentary evidence to substantiate the amount on the taxpayer's 1970 return Relying on the 1970 return, then, he said he verified the 1971 return (TR: 184)

The "required records" appellant referred to in his workpapers are unidentified. There were no records showing that taxpayer "J" did in fact incur the deductible interest expense. The record also indicates that appellant did not audit the taxpayer's 1970 interest deduction. (Evidence File: Tab 18) It is, therefore, found that appellant's statement of "verified by required records" was false.

In specification 11, appellant said he "verified" $480 of contributions and allowed another $27 on oral

testimony; however, the taxpayer could substantiate only $50.75 of the contributions. (File: Tab 21) Appellant could not remember why he specifically mentioned oral testimony separate and apart from verification, since oral testimony was encompassed within his definition of verification. However, he noted that he generally did not allow "too much" on the basis on only an oral statement. (TR: 187, 188) His workpapers indicate that he verified $480 by cancelled check. (Tab 21; Written Reply, page 11) The taxpayer, however, stated that he made his contributions in cash. Therefore, appellant's statement that he verified the basis for the deduction is found to be false.

Appellant allowed $647 in contributions as "all verified by required records" in specification 12; however, the taxpayer subsequently could not provide any documentation to support the deductions. (File: Tab 23) Appellant did not identify any records, but stated that he "may have seen something" that supported the contribution deduction, such as a publication from a church listing the taxpayer as an active member. Appellant's statement that the amount was "verified by required records" is, however, found to be false.

In specification 15, appellant allowed a deduction of $172.41 as "verified by store receipt." The taxpayer, in a subsequent affidavit, stated that he had no documentation for the expense (tools of the trade-business expense). (Tab 29) Appellant stated that he relied on Ms. Winkels, who "assured" him that she had seen a receipt. (TR: 196) Since there was, in fact, no receipt,

it again is found that appellant made a false statement when he stated that the deduction was "verified by store receipt."

Specification 16 notes that appellant "verified by required records" a medical deduction of $297. The amount substantiated by the taxpayer, however was significantly less than the deduction. (File: Tab 31) It is found that the evidence contains no record to support the deduction taken. Therefore, appellant's statement that the deduction for medical expense was "verified by required records" is found to be false.

Appellant also "verified" over $500 in contributions for which taxpayer "P" (specification 16) had no substantiation. Appellant stated that he arrived at this result in a manner similar to other returns (Note: specification 1). (TR: 197)

Specification 17 states that appellant approved a deduction for total taxes of $1,882 as "all verified as filed by required records." The taxpayer, however could only substantiate $8.82 of that amount. In addition, appellant approved $825 of contributions made by the same taxpayer with this statement: "verified $825.00 by documentation-allow balance in O/T (oral testimony)." The taxpayer substantiated only $200 of that amount. (File: Tab 33) With regard to the taxes deduction, appellant stated that he "verified" the total because he was "satisfied" as to the basic deduction. (TR: 198) He noted that he may have taken the preparer's word for that deduction. Appellant's statements in this audit report are, therefore, found to be false.

With regard to those returns where appellant merely "verified" the deduction amounts, it should be noted that appellant knew that the Tax Preparers' Program was designed to identify those taxpayers who fraudulently increased exemptions and made "grossly exaggerated deductions." In view of that knowledge, it is considered significant that he accepted some items on preparer's word that the deductions were valid or that documentation for them existed. (TR: 196, 224, 225) (Note: Ms. Winkels represented all but two of her clients by power of attorney. The returns of those two dealt with schedule C losses. (TR: 182, 221, 222)

Although appellant claimed that he was under severe time pressure (TR: 229), it is noted that he finished his audit of Ms Winkels at least one month before the audit reports were due, and he could, therefore, have conducted further inquiries. While all of the items noted in the specifications were not subject to complete substantiation, an attempt could have been made o substantiate them to a greater degree than was done. The record establishes that primary documentation was preferred, when available, to verify or substantiate a deductible item. In addition, one of appellant's witnesses indicated that an auditor should "hit the high spots" (document the larger items in the return) before he allowed the smaller items on the basis of oral testimony or other evidence. (TR: 261) The fourteen specifications in the instant case, however, show that appellant consistently verified large deductions on the basis of little or no documentation.

While it is uncertain in all cases how appellant verified the deductions, if he did so, his workpapers indicate in some cases how he arrived at that determination. His workpapers in specification 11, as already noted, indicate that he used a cancelled check to verify $480 of the contribution deduction. Also, appellant's workpapers in specification 6 (Tab 12, Evidence File) indicate that he verified the contribution portion of the return by cancelled checks and statements; however, the taxpayer stated that he was unable to substantiate any of the amount. The evidence establishes that since appellant could not have seen documentation supporting the deductions in those cases, he could not have verified the returns in the manner that was indicated.

In those specifications where appellant merely stated that he had "verified" the deduction, and it is uncertain how they were verified, the record indicates that appellant accepted the testimony of Ms. Winkels in every instance with little or no supporting documentation. In view of the fact that appellant was auditing a person who was suspected of preparing fraudulent returns, such an audit did not, in fact, serve to "verify" any of the deductions as noted in the specifications, and appellant's statements to the contrary have been found to be false. The cumulative record supports the general charge that appellant made false statements in his audit reports, and the charge, therefore, is sustained.

In view of the nature of the offenses involved, it is found that the agency did not act in an arbitrary or capricious manner when it removed appellant, and that

such action was one which would promote the efficiency of the service.

DECISION

The Internal Revenue Service need make no change in its action removing appellant from its employment rolls.

This is a final decision of the Federal Employee Appeals Authority and there is no further right of administrative review.

For the Commission:

Stephen E. Manrose
Assistant Appeals Officer

Leland L. Walton
Chief Appeals Officer

APPENDIX D

STATUTES

5 U.S.C. 554 Adjudication

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

(2) The selection or tenure of an employee . . . .

5 U.S.C. 556 Hearings; Presiding employees; Powers and duties; Burden of proof; Evidence; Record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by Section 553 or 554 of this title to be conducted in accordance with this section.

(d) Except as otherwise provided by statute, the proponents of a rule or order has the burden of proof . . . the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled . . . to conduct such cross-examinations as may be required for a full and true disclosure of the facts.

5 U.S.C. 702 — Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. 704 — Actions Reviewable

Agency action made reviewable by statute and agency action for which there is no adequate remedy in a court are subject to judicial review.

5 U.S.C. 706 — Scope of Review

To the extent necessary to decisions and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(2) Hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(D) without observation of procedure required by law;

(E) unsupported by substantial evidence in a case

subject to Section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

5 U.S.C. 330 — Civil Service Rules

1.3 — Definitions

As used in these Rules:

(e) "TENURE" shall mean the period of time an employee may reasonably expect to serve under his current appointment. Tenure shall be granted and governed by the type of appointment under which an employee is currently serving without regard to whether he has a competitive status or whether his appointment is to a competitive position or an excepted position.

5 U.S.C. 7511 — Definitions

For the purpose of the subchapter —

(1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an executive agency or as an individual employed by the Government of the District of Columbia. . . .

(2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

5 U.S.C. 7701 — Appeals of Preference Eligibles

A preference eligible employee as defined by Section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decisions under Section 7512 of this title of an administrative authority so acting . . .

APPENDIX E

REGULATIONS

5 C.F.R. 752.201 — Coverage

(a) *EMPLOYEES COVERED.* This subpart applies to:

(1) (i) — Any career, career-conditional overseas, limited, indefinite, or term employee, or any employee serving under a career executive assignment, in a competitive position who is not serving a probationary or trial period and (ii) any employee serving in a competitive position who has completed one (1) year of current continuous employment except one serving under a temporary appointment with a definite time limitation or a limited executive assignment;

5 C.F.R. 772.305 — Evidence

(a) *AFFIDAVITS.* Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision. . . .

5 C.F.R. 772.307 — Hearings

(b) *RIGHT TO A HEARING.* An Appellant is entitled to a hearing before the Office of the Appeals Authority having jurisdiction of the appeal. . . .

(c) *HEARING PROCEDURES* . . .

(2) Both parties are entitled to produce witnesses and to introduce signed sworn statements or letters of

interrogatory. The Appeals Authority is not authorized to subpoena witnesses.

(3) An Appeals Officer of the Appeals Authority shall conduct the hearing and shall afford the parties opportunity to introduce evidence (including testimony and statements by the Appellant, his representative, representatives of the agency, and witnesses), and to cross-examine witnesses. Testimony is under oath or affirmation. Rules of Evidence are not applied strictly, but the Appeals Officer shall exclude irrelevant or unduly repetitious testimony . . .

Supreme Court, U. S.
FILED
JAN 31 1979
MICHAEL RODAK, JR., CLERK

No. 78-831

In the Supreme Court of the United States

OCTOBER TERM, 1978

NEIL A. RINGQUIST, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-831

NEIL A. RINGQUIST, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 582 F. 2d 1138. The opinion of the district court (Pet. App. 1b-6b) is not reported. The opinion of the Civil Service Commission (Pet. App. 1c-14c) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1978. The petition for a writ of certiorari was filed on November 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1]The Civil Service Commission, whose chairman was named as respondent, has been abolished by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 91 Stat. 1111. The functions relevant to this case have been assumed by the Merit Systems Protection Board effective January 1, 1979.

QUESTION PRESENTED

Whether petitioner was properly discharged from his federal employment.

STATEMENT

Petitioner, formerly a tax auditor for the Internal Revenue Service, received notice on June 30, 1975, of a proposal to fire him. The notice stated that on 17 individual tax returns petitioner had described as verified or substantiated claims of deductions for which no documentation or inadequate documentation existed (Pet. App. 2a). All 17 returns had been completed by Mildred Winkels, a tax preparer known by petitioner to be under IRS investigation for suspected exaggerated deductions and fraudulent returns (Pet. App. 1b-2b, 3c).

Petitioner was offered an opportunity to review the material supporting the charges and to respond in writing (Pet. App. 4c). The acting District Director of IRS sustained 14 of the 17 specifications and considered the remaining three specifications to be dismissed. On September 22, 1975, petitioner was removed from IRS employment as of October 10, 1975 (Pet. App. 5c).

Petitioner appealed to the Appeals Authority of the Civil Service Commission. The Appeals Authority received testimony from IRS employees about accepted auditing practices, and it also received affidavits from 17 taxpayers, who stated that they could not substantiate the deductible items that petitioner had verified in his audit (Pet. App. 5b). Petitioner did not controvert the accuracy of the affidavits; he argued, instead, that his "verification" derived from the word of the tax preparer (Pet. App. 5b, 7c-11c).

The Appeals Authority upheld the dismissal, and the Civil Service Commission Review Board declined to exercise discretionary review. Petitioner then brought this suit, seeking reinstatement and back pay (Pet. App. 2a, 2b). The district court granted summary judgment for the government, holding that petitioner had received due notice and a hearing that was proper under applicable regulations; the court also held that these procedures satisfied due process standards. The court found that petitioner's dismissal was supported both by a rational basis and by substantial evidence (Pet. App. 3b, 5b, 6b).

The court of appeals first held (Pet. App. 2a-4a) that a discharge properly should be reviewed to guard against arbitrary and capricious action but not to look for substantial evidence. The substantial evidence rule, the court held, applies only to actions taken after full hearings on the record. The Civil Service statutes, the court said, do not require such hearings, and 5 U.S.C. 554(a)(2) demonstrates the inappropriateness of the substantial evidence standard in such cases. The court then concluded that the procedures followed in petitioner's hearing did not violate the Due Process Clause because the Constitution does not invariably require that all evidence be presented by live witnesses (Pet. App. 4a-8a). Finally, the court held that there was ample evidence to support the discharge (*id.* at 8a-9a).

ARGUMENT

1. Petitioner first contends that his hearing violates the Due Process Clause (Pet. 8-13). His argument is that the Clause forbids the introduction of evidence by affidavits.[2]

---

[2]Petitioner also argues that he was deprived of his right to counsel. He did not elaborate on this claim in the court of appeals, and his petition does not state how the alleged deprivation occurred. Federal employees are entitled by regulation to the assistance of counsel in such hearings. 5 C.F.R. 772.307. Petitioner's further argument that he was denied access to an unspecified IRS investigation report and hindered in his attempt to obtain the names of affiants does not afford any ground for relief. Petitioner does not show—or even argue—that these things were material to his defense, or that they would have been helpful if obtained. See *Moore* v. *Administrator, Veterans Administration*, 475 F. 2d 1283, 1285 (D.C. Cir. 1973).

Petitioner's case was handled in accordance with the applicable regulations. Under 5 C.F.R. Part 752B, petitioner had a right to advance written notice of the proposed adverse action, including a detailed statement of specifications and reasons; a right to review the material underlying the charges; a right to reply in writing (and to submit evidence); and a right to appeal to the Civil Service Commission. Under 5 C.F.R. 772.307 the Commission's hearing offered petitioner a full opportunity to present evidence. Petitioner could appear personally and by a representative, introduce witnesses, cross-examine adverse witnesses, and obtain a transcript of the proceedings. Because the Commission does not have the authority to compel the presence of persons who are not federal employees, however, some evidence in such hearings may be introduced by affidavit. 5 C.F.R. 772.307(c)(2).

Petitioner had a right to a full oral hearing. Indeed, the procedures followed here were more thorough than those that this Court held, in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), to be sufficient for the dismissal of a federal employee. Although some evidence was presented by affidavit in this case, the Due Process Clause does not forbid this practice. See *Richardson* v. *Perales*, 402 U.S. 389 (1971). The use of affidavits was not constitutional error where, as here, the information in the affidavits was undisputed; petitioner's defense accepted the truth of the affiants' statements that they had not supplied proof of the claimed deductions, and petitioner argued only that the "verification" of the deductions had been supplied by the person who prepared the 17 tax returns (Pet. App. 7c-13c). The use of affidavits rather than live witnesses thus had no bearing on the case (Pet. App. 6a-7a).[3]

[3]Petitioner asserts that a number of cases conflict with the decision of the court of appeals here. But the court of appeals accurately distinguished these cases (Pet. App. 7a) for the reasons given in the

2. The court of appeals upheld the trial court's finding that petitioner's discharge is supported both by a rational basis and by substantial evidence (Pet. App. 4a n.2, 8a-9a, 6b). The court found the lesser standard of review appropriate (Pet. App. 2a-4a). But because there has been a finding that the discharge was supported by substantial evidence, there is no need for this Court to consider which of the standards of review is the right one. Some courts have applied the substantial evidence standard to employee discharge cases without discussion,[4] and the issue may require review in a future case, but it is not presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

text. Moreover, we doubt that the cases on which petitioner relies survived *Arnett* v. *Kennedy* and subsequent due process cases. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). There is no reason for this Court to review the subject in advance of an indication that other courts will adhere after *Eldridge* to a rigid view that the Constitution always forbids the introduction of evidence by affidavit in employee discharge cases.

[4]The courts have used different standards of review of agency discharges without articulating the basis for their choice. See, *e.g.*, *Charlton* v. *United States*, 412 F. 2d 390, 395 (3d Cir. 1969); *Halsey* v. *Nitze*, 390 F. 2d 142, 144 (4th Cir.), cert. denied, 392 U.S. 939 (1968); *Meehan* v. *Macy*, 392 F. 2d 822, 830, 837 (D.C. Cir. 1968); *Taylor* v. *United States Civil Service Commission*, 374 F. 2d 466, 470 (9th Cir. 1967).

DOJ-1979-01